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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1041

JAMES CARLISLE BASKIN,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

MARION W. SEABROOK,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petition.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James Carlisle Baskin, respectfully presents to this Court his petition for a writ of certiorari addressed to the Honorable Court of Claims of the United States, commanding said Court and the Clerk thereof to certify to this Court the record and proceedings of the case in said Court wherein your petitioner was plaintiff and the United States was defendant, No. 45,522, together with its opinion therein, for the review and determination of said cause by this Court.

Summary or Statement.

On August 1, 1941, Petitioner brought suit in the Court of Claims to recover from the United States $6,845 as salary in the position of Penitentiary Guard at the rate of $1,680 per annum from January 15th, 1936 after deducting $2,605 earned in private employment subsequent to that date.

The Government moved the Court of Claims to dismiss plaintiff's petition on the ground that it failed to set forth a cause of action within the jurisdiction of that court. The Judgment of the Court of Claims, rendered January 5, 1942, sustained this motion, which was in the nature of a demurrer to the petition.

The facts of the claim are stated in the opinion of the Court in considerable detail, so we will limit the statement here to the essentials.

The Petition in the Court of Claims.

The petition alleges that plaintiff served in the United States Army as a first Lieutenant from August 31, 1917 to July 18, 1919, when he was honorably discharged. From March 1, 1928, he was employed in the United States Prison Service, Department of Justice, under the Warden of the United States Penitentiary at Lewisburg, Pa., having been appointed to that service and duly qualified after examination, in accordance with the regulations of the Civil Service Commission. That as a classified employee in the Civil Service he was entitled to the protection of the provision in Section 6, Act of August 24, 1912 (Sec. 652 of Title 5 of the United States Code), requiring that removals from the classified services be only for cause.

That section provides that no person in the classified Civil Service

> "shall be removed therefrom except for such cause as will promote the efficiency of said service and for rea-

sons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof." etc.

We respectfully submit that the petitioner has been deprived of his office in violation of this statute. The following pertinent provision also appears therein:

> "The right of persons employed in the Civil Service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with."

The petition then further alleges that plaintiff was an honorably discharged soldier, and that plaintiff was entitled to the protection of the provision in Title 5, Section 648 that in the event of reductions being made in the force of the executive departments, no honorably discharged soldier whose record in said department which is rated good shall be discharged or dropped or reduced in rank or salary.

It further alleges that on September 3, 1935, while serving as a Guard in the United States Penitentiary at Lewisburg, Pa., at a salary of $1,680 per annum the plaintiff received a formal notice of suspension from the Warden of that institution upon the charge of "having written letters to officials of the Government, criticizing the administration of Prison affairs." That he promptly submitted a sworn reply to said charge, stating that the letters were written by him properly and in good faith and did not violate the rules, but he was nevertheless suspended without a hearing and never permitted to resume his duties.

That on or about October 4, 1935 he wrote the Director of the Bureau of Prisons a letter expressing his regret of the

mistake he had made in writing the letters criticizing the prison administration. To this, on October 8, 1935, the Assistant Director of the Bureau replied to the effect that the Director *had accepted his explanation* and was willing to give him the best letter or recommendation he could consistently issue; and suggested that if plaintiff would send to the Bureau his application for leave without pay, they would arrange to terminate his suspension; with the understanding that while he would officially be a part of the prison service, he would not report back for duty at Lewisburg, but retain the status of an employee on leave without pay, pending efforts to secure a transfer to some other branch of the service.

The petition sets out this letter of recommendation, outlining the good record of plaintiff in the service and concluding with these words:

> "during this period of employment he has rendered faithful, conscientious service. Reports from his Superior officers show him to be a competent employee" (R. 8).

The petition further alleges his compliance with the Assistant Director's suggestion; and a letter from the Director to the Warden at Lewisburg containing the following condoning statement: "We consider that the discipline administered Mr. Baskin through the medium of the suspension * * * is sufficient * * *."

It is further alleged that after fruitless efforts to obtain a transfer to some other branch of the service the plaintiff sought reinstatement as a prison Guard. Rebuffed, he consulted legal counsel. (Different from the one now representing him.) That in response to a request for pertinent information, his counsel was abruptly advised by the Assistant Director in a letter dated January 15, 1936, "that the plaintiff's time is now up, and his appointment is, there-

fore, being terminated for the good of the service." That the plaintiff was then dropped without notice of any new charge, and without any opportunity whatever to answer in writing or otherwise, and without being given the statutory protection above cited.

That, in September, 1937, the plaintiff filed suit in the District Court of the United States for the Eastern District of South Carolina. The suit was dismissed on April 6, 1940, for lack of jurisdiction, the Court being of the opinion that the plaintiff was an officer of the United States within the meaning of that portion of the Tucker Act in which the District Courts are denied concurrent jurisdiction with the Court of Claims of cases brought to recover salaries of officers. That immediately after dismissal of the said suit the plaintiff sought to obtain counsel for the prosecution of the matter before the Court of Claims. That "he was unsuccessful in his efforts until now." (the time of preparation by his Washington Counsel of his petition in the Court of Claims).

Action of the Court of Claims.

The Court of Claims has, in effect, sustained a demurrer to this petition, and thereby denied the plaintiff a trial on the merits, basing this decision upon the following basic propositions, the soundness and legality of which are questioned by this petition for certiorari, to wit:

(1) That the action of the Government officials was in accordance with the statute (Title 5, Section 652, U. S. Code) and the regulations of the Civil Service Commission and is not subject to review by the Court of Claims.

(2) That the termination of plaintiff's suspension, leaving him in the status of an employee on leave without pay, did not give the plaintiff the right to demand

the position from which he had been removed, or the pay thereof.

(3) That the termination "for the good of the service" of plaintiff's appointment was clearly not illegal.

(4) That at the time plaintiff's appointment was terminated on January 15, 1936, he was not holding any position in the Government service from which he was entitled to pay compensation.

(5) That plaintiff was guilty of *laches* after January 15, 1936, in asserting his claim.

(6) The fact that plaintiff was an honorably discharged soldier does not under the facts of this case affect the decision.

Reasons Relied on for the Allowance of the Writ.

Bearing in mind the principles enunciated in such cases as *Leimer* v. *State Mutual Life Insurance Co.*, 108 F. (2d) 302, that there is no justification for dismissing a petition for insufficiency except it appears *to a certainty* that plaintiff would be entitled to no relief under *any state of facts* which could be proved thereunder, we shall, in the order above shown, respectfully endeavor to show the fallacies of the positions on which the honorable Court's decision rests, to wit:

(1)

Did the Government officials act in accordance with Title 5, Section 652, of the United States Code and the regulations of the Civil Service Commission, in either the first suspension or the final dismissal? They did not. The Statute says:

> *"No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service."*

Was it not defensive matter to have been set up in and proved under an Answer that the removal was for such cause as would promote the efficiency of said service? Where does it appear on the face of the petition to justify the sustaining of a demurrer thereto that plaintiff's suspension in September 1935, much less the final discharge on January 15, 1936, would have in any wise promoted *the efficiency of the service* as the statute requires? True, the Assistant Director's arbitrary fiat of January 15, 1936, is quoted about the appointment being terminated "for the good of the service;" but there is no such allegation at all with reference to the *suspension;* and, as to the *discharge,* there is a distinction between the phrase, "*for the good of the service,*" and the clause, "*as will promote the efficiency of the said service.*" used in the Statute. It may be "for the good of the service" to maintain the immunity of superiors from the criticisms of their subordinates, however just and well founded; but Congress, in its wisdom, did not adopt that as the yardstick by which dismissal may be merited and there is no law or regulation which inhibits proper criticism. To justify dismissal the cause must have been such "*as will promote the efficiency of the said service*;" and how could the Court of Claims have known from a mere pleading, and without hearing the evidence, that the criticism here involved was not directed into lawful channels and itself calculated to promote the efficiency of the said service? Truthful, just and constructive criticism, free from slander, such as this was, always tends to promote efficiency. Congress recognizes that in this very statute itself, which invites and allows petitions to the Members of Congress. Only a hearing on the evidence can reveal that the letters written by the plaintiff did not come up to these standards.

There was no charge of incompetency or neglect of duty on the part of the plaintiff here, such as there was in

most of the cases cited by the Court of Claims. There is no need here to review the action of Government officials vested with jurisdiction in the matter of suspension or discharge of an employee charged with delinquency; but here only are pure issues of law: (a) did the officials have the legal power to suspend or discharge in the manner employed; (b) were not the reasons assigned by them on their face totally insufficient *as a matter of law,* and subject themselves to demurrer or dismissal without the consideration of evidence in support of the charges being necessary; and (c) did the officials who suspended and then discharged this petitioner have any statutory or constitutional power to do so at all?

(a)

Title 5, Section 652 of the U. S. Code, further provides:

> *"No person in the classified civil service of the United States shall be removed therefrom except • • • for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him • • • and also be allowed a reasonable time for personally answering the same in writing,"* etc. etc.

Where are the reasons required by the statute in the dismissal of January 15, 1936? Surely the arbitrary fiat, above shown to be insufficient, will not do. Things have not come to such pass in this free land of ours that a sufficient reason may be found in the plaintiff's having consulted counsel.

No answer was then allowed. Judgment came on the wings of the warning! Pre-judged, the sentence of dismissal anticipated and made useless the defense.

(b)

> *"The right of persons employed in the civil service of the United States either individually, or collectively, to petition Congress, or any Member thereof, or to furnish information to • • • any • • • member thereof shall not be denied or interfered with."* Sec. 652, *supra.*

We respectfully submit that the honorable Court of Claims erroneously shut off the possibility of proof by the plaintiff that the original suspension was illegal if it should appear from the evidence that the offense for which he was suspended consisted mainly of communicating with Members of Congress. The allegations of the petition were ample to let in evidence that what he did consisted mainly of writing members of Congress.

Therefore, we respectfully submit, under the rule that pleadings should be given a liberal construction, if it should appear from the evidence on trial that the dismissal of plaintiff was largely or mainly motivated by his having laid his complaints or alleged criticisms before Members of Congress, the original suspension of plaintiff would have been an illegal act and void act, violative of Title 5, Section 652.

The Court was patently in error in this regard in saying that the action of the Government officials was in accordance with the regulations of the Civil Service Commission. From a bulletin issued by that body bearing date April 1934, being form 505, entitled "REMOVAL, REDUCTION, SUSPENSION, AND FURLOUGH" we quote below section 33 on the subject of "CAUSES FOR REMOVAL". From this it may be plainly seen that the writing in good faith of critical but truthful letters to the proper officials has never been treated as a valid ground of removal or suspension. Only the intentional making of a *false* statement is recognized

as a reason which shall be a good cause for removal. There is no hint here that any statement made by this Petitioner was intentionally false.

The section above mentioned is as follows:

"CAUSES FOR REMOVAL

"33. The removal statute provides that 'No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service.' What constitutes sufficient cause is a matter in the discretion of the removing officer, but it must be substantial and must be a cause touching the qualifications of the person removed or the performance of his duties, showing that he is not a fit or proper person to hold the office,[10] separation on account of reduction in force and for similar reasons not being regarded as removal within the meaning of the statute. Some of the reasons which shall be good cause for removal are enumerated in the civil-service rules, as follows: Physical or mental unfitness for the position which the officer or employee holds; criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct; *intentionally making a false statement in any material fact*, or practicing any deception or fraud in securing examination, registration, certification, or appointment, refusal to furnish testimony as required by rule XIV; the habitual use of intoxicating beverages to excess; consenting to a recommendation for his promotion from a person other than one under whose supervision the employee has served. Political activity in violation of the civil-service rules and Executive orders is punishable by removal or other disciplinary measures, in proportion to the gravity of the offense. Violation of the political assessments provisions of the Civil Service Act prohibiting the solicitation or receipt of political contributions by one officer or employee from another, the solicitation by any person of political contributions in Federal buildings, discrimination because of political contributions, and the making of a political contribution by one officer

or employee to another,[11] are felonies and are punishable by fine or imprisonment, or both, as well as by removal from the service. (See Form 1236, Political Activity.) The fact that any officer or employee is found directly or indirectly engaged in instructing, or is concerned in any manner in instructing any person with a view to his special preparation for civil-service examinations or for the diplomatic and consular examinations is sufficient cause for his removal from the service."

(2)

The second basic ground assigned by the court is fully answered with the proposition that, as above shown, the suspension itself was illegal. It may be true that a civil service employment is not a contract; but the power of removal is restricted by statute, and to that extent can not be exercised. Since the statute was violated, there was no removal at all, and plaintiff was never out of his position, and was entitled to the pay thereof. If there were any offense in the first instance, it was fully condoned; hence the specification in writing of an entirely new offense was necessary to validate the removal on January 15, 1936, and that was not done.

The District Court of the United States for the Eastern District of South Carolina had adjudicated that this identical petitioner was an officer of the United States. *Baskins* v. *United States*, 32 Fed. Supp. 518. The government was a party to that adjudication and the Court of Claims was bound to have taken judicial notice of it. Since, as *res adjudicata*, the petitioner was an officer, and since his removal was totally illegal, the second position of the Court of Claims, that his suspension, leaving him in the status of an employee on leave without pay, did not give him the right to demand the position from which he was removed, is completely met by decisions of the Supreme Court, such as *United States* v. *Perkins*, 116 U. S. 483,

29 L. Ed. 700, 6 S. Ct. 449, and *United States* v. *Wickersham*, 201 U. S. 390, 50 L. Ed. 798, 26 S. Ct. 469, by decisions of the Court of Claims itself and by cases from other jurisdictions, all of which will be more fully demonstrated in our subjoined brief.

(3)

That terminating plaintiff's employment on grounds stated to be "for the good of the service" was illegal has been demonstrated under our treatment of the Court's basic ground No. 1 above, and need not be repeated here.

(c)

But, as the Court of Claims has denominated this termination of plaintiff's employment as "clearly not illegal," we respectfully submit that its illegality and the honorable Court's error may be pivoted upon further statutory and constitutional grounds that are irrefutable, to wit:

Plaintiff's suspension came through the medium of the Warden of the United States Penitentiary at Lewisburg, Pa. (R. 1), the Assistant Director of the Bureau of Prisons and the Director himself (R. 2, 3). His final dismissal of discharge came from the Assistant Director (R. 3). Did those officials, or any of them have the legal or constitutional right of removal?

The Act of Congress of May 14, 1930, c. 274, section 1, appearing as Section 753 of Title 18 of the United States Code reads as follows, to-wit:

> "There is established in the Department of Justice, a Bureau of Prisons, to be in charge of a director, who shall be paid a salary at the rate of $10,000 a year, *and shall be appointed by and serve directly under the Attorney General.* The officers and employees of the existing office of the Superintendent of Prisons; all official records, furniture and supplies; and all of the au-

> thority, powers, and duties conferred by law or regulation upon the Superintendent of Prisons or any of his subordinates are hereby transferred to the Bureau of Prisons. *The Attorney General shall have the power to appoint such additional officers and employees as may be necessary.*" (Emphasis added.)

Prior to the Act of May 14, 1930, above quoted, "the existing office" of the Superintendent of Prisons was dependent upon the Act of Congress of March 3, 1891, C. 529, Section 4 (26 Stat. 839), as found in Section 10555 of United States Compiled Statutes, 1916, Volume 10, page 13019, which reads as follows:

> "That the control and management of said prisons be vested in the *Attorney-General, who shall have the power to appoint a superintendent, assistant superintendent, warden, keeper, and all other officers* necessary for the safe-keeping, care, protection, and discipline of such United States prisoners." etc. etc. (Emphasis added.)

The plaintiff here was appointed by the Attorney General. *Baskins* v. *United States*, 32 Fed. Supp. 518, 520.

These sections confer the power of appointment solely on the Attorney General; and no such power is vested in the Director of the Bureau of Prisons, or in his Assistant or in any Warden of a Prison. *It is axiomatic that the power of appointment to office carries with it the power of removal.* Hence, the Attorney General alone could have removed Baskin, and the action attempted by the Warden at Lewisburg, the Assistant Director and by the Director were utterly null and void. Can one appointee of the same power remove another appointee?

If the declaration of the Court of Claims is sound that the termination of the plaintiff's employment was "clearly not illegal;" meaning, we assume, in accordance with statute, then these statutes we respectfully submit, are uncon-

stitutional; because Article II, Section 2, Clause 2, of the Constitution stipulates:

> "but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the Courts of law, or *in the Heads of Departments.*" (Emphasis added.)

Thus, only may a Cabinet officer appoint, the Attorney General in this instance; and, we respectfully submit, he alone could remove.

(4)

For its fourth basic ground of decision the honorable Court of Claims took the view that at the time plaintiff's appointment was terminated, he was not holding any position in the Government service from which he was entitled to any compensation. This is fully answered above, because plaintiff was never removed or even suspended legally or constitutionally. Moreover, the very reason for which his action in the United States District Court for the Eastern District of South Carolina was dismissed was an adjudication that he was or had been an officer of the United States.

The case comes to this: the plaintiff by his appointment as an officer was entitled to the privileges and emoluments of his position. The attempted dismissal without authority of law, he remaining ready and willing to discharge the duties of the place, could not during the period thereof, have the effect to deprive him of the compensation legally belonging to one entitled to hold the position; and it was legally recoverable in the Court of Claims.

United States v. *Wickersham*, 201 U. S. 392, 399, 50 L. Ed. 798, 801;

McLean v. *United States*, 45 Ct. Cl. 95.

(5)

Your petitioner respectfully submits that the honorable Court of Claims erred in charging the plaintiff with *laches* in the prosecution of his claim after January 15th, 1936; because his petition in the Court of Claims shows that, within a reasonable time thereafter, he filed suit in the District Court of the United States for the Eastern District of South Carolina; and, regardless of the outcome of that effort on plaintiff's part, it at least showed that he was pressing the matter with diligence, and to the best of his knowledge as to how to proceed; and at least adjudicated that he had been an officer, an essential point in this case.

We further respectfully submit that the Court of Claims was in error in applying the doctrine of *laches* to this case at all, because that is strictly an equitable doctrine, which is shown by the very authority cited by the Court in support of its application here; whereas this is absolutely an action at law, wherein such doctrine has no place whatever, and is governed by the statute of limitations, which allows six years in which suit may be brought. Title 28, Section 262 of the United States Code. The plaintiff brought his suit amply within the statute.

As above stated, the *Arant* case, cited by the Court of Claims, itself plainly shows that *laches* is purely equitable; and we have not been able to find any case which adjudicates against our position that in a *law case*, such as this is, *laches* can oust the operation of the statute of limitations; for if that were so, the Court would be exercising a veto or repealing power that it does not possess.

In our subjoined brief we will more fully demonstrate that the Court of Claims, like all other courts of exalted jurisdiction, administers, or should administer, legal and equitable jurisprudence under the rules which separate the two, notwithstanding the power of most modern courts to administer both.

It might be correct to say that the fact that plaintiff was an honorably discharged soldier would not affect this case, if it was merely a matter of the Court's being asked to review the action of executive officers of the Government in suspending or removing a subordinate for some legally valid charge, such as misconduct or inefficiency. But, there being no deficiency charged up to plaintiff here, as there was against the claimants in the cases cited by the Court, and as required by Title 5, Section 648, of the Code to justify a dismissal, his status as an honorably discharged soldier *does* come to his aid under the *spirit* of that section; which is to protect the honorably discharged soldier whose record is not legally impugned.

We see no need to stress the supposed issue of which the Defendant's Counsel in the Court below seem to have made much, which was that plaintiff's suit for accrued salary seeks to try his right and title to office, and that the Court of Claims was without jurisdiction to try such an action. The obvious answer is that the Court of Claims paid no attention whatever to this supposed issue, and said nothing about it. On the contrary, it decided the case as though it had jurisdiction, which we think was eminently correct. We will advert to a few authorities in the brief to show that the Court did have jurisdiction, but we believe this unnecessary for the further obvious reason that trial of title to office, as usually found in proceedings *quo warranto*, only arises where there are two contenders for it. Nothing of the kind appears here. This is merely a suit for salary, and no other person's right to the office is involved.

Your petitioner amplifies his grounds in and by his brief which is subjoined to this petition, reference to which is craved.

Your petitioner presents herewith a certified copy of the entire record in said cause, including the proceedings in the Court of Claims and the opinion of the said Court, and states that the record below reposes in the said Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the Honorable Court of Claims of the United States, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings had in this cause, to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law; and that the judgment of the said Honorable Court of Claims may be reversed by this Honorable Court; and for such further relief as may be proper.

And your petitioner will ever pray, etc.

MARION W. SEABROOK,
Sumter, S. C.,
Counsel for Petitioner.

STATE OF SOUTH CAROLINA,
County of Sumter:

Personally appeared before me J. C. Baskin, who, being duly sworn, says that he is the Petitioner above named; and that he has read the foregoing Petition for Writ of Certiorari; and that the same is true to the best of his knowledge and belief.

JAMES CARLISLE BASKIN.

Sworn to before me this 12th day of March, 1942.

MARION MOISE, [L. S.]
A Notary Public in and for South Carolina.

[NOTARIAL SEAL.]

My commission expires at the pleasure of the Governor of South Carolina.